7-10-2013

Vawter v. United Parcel Service Respondent's Reply Brief 1 Dckt. 40660

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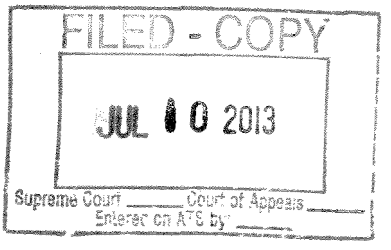
BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL VAWTER, Claimant / Respondent / Cross-Appellant, vs. UNITED PARCEL SERVICE, and LIBERTY INSURANCE CORPORATION, Defendants / Appellants / Cross-Respondents, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant / Respondent / Cross-Appellant.	Supreme Court No. 40660 RESPONDENT / CROSS-APPELLANT'S REPLY BRIEF



APPEAL FROM THE INDUSTRIAL COMMISSION, STATE OF IDAHO

Thomas Limbaugh, Chairman Presiding

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(II) THE STANDARDS OF APPELLATE REVIEW

The Claimant was the prevailing party before the Industrial Commission at both the 9.28.10 Hearing and at the 5.17.12 Hearing. As the prevailing party, the Claimant is entitled to have all facts and inferences in the record viewed in his favor on appeal:

> This Court views all facts and inferences "in the light most favorable to the party who prevailed before the Commission." *Taylor v. Soran Rest., Inc.,* 131 Idaho 525, 527, 950 P.2d 1254, 1256 (1998) (internal quotations and citation omitted). *Page v. McCain Foods, Inc.*, 145 Idaho 302, 305, 179 P.3d. 265, 268 (2008).

The Idaho Supreme Court can only **set aside** the findings of fact and conclusions of law in the Industrial Commission's 5.17.11 and 12.5.12 decisions if it finds that the standards of Idaho Code §72-732 have been met:

> In reviewing decisions of the Industrial Commission on appeal to this Court, Idaho Code section 72-732 sets forth the standard of review. **This Court may** affirm or **set aside an order or award made by the Commission**, " or may **set it aside only upon the following grounds**: (1) the commission's findings of fact are not based on any substantial competent evidence; (2) the commission has acted without jurisdiction or in excess of its powers; (3) the findings of fact, order or award were procured by fraud; (4) the findings of fact do not as a matter of law support the order or award." I.C. § 72-732; *Ewins v. Allied Sec.,* 138 Idaho 343, 345-46, 63 P.3d 469, 471-72 (2003). *Magee v. Thompson Creek Min. Co.,* 152 Idaho 196, 200, 268 P.3d 464, 468 (2012) (emphasis supplied).

The Employer's appeal of the Industrial Commission's 5.17.11 decision and 12.5.12 decision is limited to the grounds set forth in Idaho Code §72-732(1) and (4). Under Idaho Code §72-732(1), the only relevant question on appeal is whether the Commission's findings of fact

were based on any substantial competent evidence. This Court has defined substantial and competent evidence as follows:

> Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. *Eacret v. Clearwater Forest Indus.*, 136 Idaho 733, 735, 40 P.3d 91, 93 (2002). *Mazzone v. Texas Roadhouse, Inc.*, p. 5, Docket No. 39337, Filed June 4, 2013.

The only finding of fact in the 5.17.11 decision that Employer has challenged on appeal was clearly supported by substantial and competent evidence and should be affirmed on appeal.

(III) ARGUMENT

(1) EMPLOYER FAILED TO MEET ITS BURDEN OF PROVING THAT THE INDUSTRIAL COMMISSION'S FINDINGS OF FACT WERE NOT SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE AS REQUIRED BY IDAHO CODE §72-732(1)

On 4.24.13 Employer filed its 46 page Appellant's Brief. The only finding of fact in the Commission's 5.17.11 decision that Employer challenged in its 4.24.13 Brief pursuant to Idaho Code §72-732(1) was the following:

> There is no dispute that Claimant suffered an accident and injury on December 18, 2009, as those terms are defined in Idaho Code §§ 72-102 (18)(a)(b) and (c), and that the accident causing the injury occurred during the course of Claimant's employment. The question is whether his accident and injury arose out of his employment (R., Vol. I, p. 35, Ll. 9-12).

Employer challenged that finding of fact with the following assignment of error:

> In this case, the Industrial commission erred by asserting UPS did not dispute an accident or injury as defined in Idaho Code §72-102(18) had occurred (*See* p. 17, Ll. 8-9 of Employer's 4.24.13 Appellant's Brief).

When the Claimant filed his 5.22.13 Respondent's Brief, he emphasized that **Employer had only challenged a single finding of fact** in its appeal of the Industrial Commission's

5.17.11 decision (*See* p. 22, Ll. 20-22 of Claimant's 5.22.13 Respondent's Brief). When Employer filed its 6.19.13 Reply Brief, Employer did not dispute that it only challenged this single finding of fact in the Industrial Commission's 5.17.11 decision. Given this record, the only inquiry that the Court is required to make under Idaho Code §72-732(1) is whether the single finding of fact challenged by Employer was supported by substantial and competent evidence? The following discussion leaves no doubt that the single finding of fact challenged by Employer on appeal was supported by substantial and competent evidence.

Employer argues that because it denied this claim on the exclusive ground that Claimant's low back injury did not "arise out of his employment" as required by Idaho Code §72-102(18)(a), that denial would automatically include the totally different denials that the Claimant was not involved in an "accident" on 12.18.09 as that term of art is defined by Idaho Code §72-102(18)(b); the denial that the Claimant's 12.18.09 accident did not "cause" his low back injury as required by Idaho Code §72-102(18)(a), (b) and (c) and the denial that the Claimant did not suffer a low back "injury" as required by Idaho Code §72-102(18)(a), (b) and (c).

> It follows that to dispute whether an accident and injury arose out of a worker's employment includes a dispute of the occurrence of an accident and injury as defined in Idaho Code §72-102(18) (*See* p. 1, Ll. 7-9 of Employer's 6.19.13 Reply Brief).

Employer asks this Court to believe that it discussed the "accident" issue, the "causation" issue and the "injury" issue at length in its 12.17.10 post-hearing brief:

> In UPS's post-hearing brief, it asserted Respondent had 'failed to prove his injury was the result of an accident arising out of his employment' and discussed the issue at length (*See* p. 1, Ll. 19-21 of Employer's 6.19.13 Reply Brief).

Employer's argument is misleading and totally contradicted by the information in Employer's 12.17.10 post-hearing brief. A careful review of pages 12-20 of the Employer's 12.17.10 post-hearing brief confirms that Employer focused all of its arguments on the "arise out of employment" issue and conceded the "accident" issue, the "causation" issue and the "injury" issue by failing to devote even a single sentence of legal argument disputing those issues.

- Employer did not argue that Claimant was not involved in an accident because he was not involved in an unexpected, undesigned, and unlooked for mishap, or untoward event as required by §72-102(18)(c).
- Employer did not argue that Claimant's accident was not connected with the industry in which it occurs as required by §72-102(18)(c).
- Employer did not argue that Claimant's accident could not be reasonably located as to time when and place where it occurred as required by §72-102(18)(c).
- Employer did not argue that Claimant's accident did not cause his injury as required by §72-102(18)(a), (b) and (c).
- Employer did not argue that Claimant did not suffer an injury as required by §72-102(18)(a), (b) and (c).

Since Employer failed to even discuss the "accident" issue, the "causation" issue and the "injury" issue in its 12.17.10 post-hearing brief, the Commission correctly found that:

> There is no dispute that Claimant suffered an accident and injury on December 18, 2009, as those terms are defined in Idaho Code §§ 72-102 (18)(a)(b) and (c), and that the accident causing the injury occurred during the course of Claimant's employment. The question is whether his accident and injury arose **out of** his employment (R., Vol. I, p. 35, Ll. 9-12).

Even though Employer completely failed to analyze and dispute these issues in its 12.17.10 post-hearing brief, Employer asks this Court to reverse the Industrial Commission's finding that Employer did not dispute those issues at the 9.28.10 Hearing based on nothing more than a

generic listing of those issues in its Answer to the Complaint and in its Response to Claimant's Request For Calendaring (*See* p. 1, Ll. 10-19 of Employer's 6.19.13 Reply Brief).

This Court should reject Employer's argument and affirm the Industrial Commission's finding of fact that Employer did not dispute those issues because the mere listing of disputed issues in a pleading or brief without supporting argument and citation to controlling legal authority is not sufficient to dispute the issue either before the Industrial Commission or this Court:

> We will not consider an issue not "supported by argument and authority in the opening brief." *Jorgensen v. Coppedge,* 145 Idaho 524, 528, 181 P.3d 450, 454 (2008); *see also* Idaho App. R. 35(a)(6) ("The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to authorities, statutes and parts of the transcript and the record relied upon."). Regardless of whether an issue is explicitly set forth in the party's brief as one of the issues on appeal, if the issue is only mentioned in passing and not supported by any cogent argument or authority, it cannot be considered by this Court. *Inama v. Boise County ex rel. Bd. of Comm'rs,* 138 Idaho 324, 330, 63 P.3d 450, 456 (2003) (refusing to address a constitutional takings issue when the issue was not supported by legal authority and was only mentioned in passing).
>
> Where an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court. *Randall v. Ganz,* 96 Idaho 785, 788, 537 P.2d 65, 68 (1975). A general attack on the findings and conclusions of the district court, without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. *Michael v. Zehm,* 74 Idaho 442, 445, 263 P.2d 990, 993 (1953). This Court will not search the record on appeal for error. *Suits v. Idaho Bd. of Prof'l Discipline,* 138 Idaho 397, 400, 64 P.3d 323, 326 (2003). Consequently, to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived. *Suitts v. Nix,* 141 Idaho 706, 708, 117 P.3d 120, 122 (2005).
>
> *Bach v. Bagley,* 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010). The Court also held that it would not consider any issues "lacking in coherence, citations to the record, citations of applicable authority, or comprehensible argument...." *Id.* at 791, 229 P.3d at 1153. *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, __ 297 P.3d 1134, 1140, (2013).

Since Employer failed to present any cogent argument with proper citation to applicable legal authorities in its 12.17.10 post-hearing brief, the Commission correctly found that Employer did not dispute the "accident" issue, the "causation" issue, the "injury" issue and the "in the course of employment" issue. Employer does not have the right to argue those disputed issues for the first time on appeal:

> This Court will not consider arguments raised for the first time on appeal. *Obenchain v. McAlvain Constr., Inc.,* 143 Idaho 56, 57, 137 P.3d 443, 444 (2006) *Allen v. Reynolds,* 145 Idaho 807, 812, 186 P.3d 663, 668 (2008).

Employer now attempts to transfer responsibility for its failure to dispute these issues to the Claimant by arguing that he failed to meet his burden of proving each element in the prima facie case for an accident / injury claim:

> Essentially, unless a party formally stipulates to concede an issue, the party with the burden of proof is not relieved of its duty to establish a prima facie case (*See* p. 2, Ll. 16-17 of Employer's 6.19.13 Reply Brief).

Employer cannot make this argument for the first time on appeal *Allen v. Reynolds,* 145 Idaho 807, 812, 186 P.3d 663, 668 (2008). Even if the Court were inclined to entertain this veiled request for summary judgment on appeal, the Court should reject this argument since the record before the Industrial Commission contained substantial and competent evidence to support the Commission's finding that the Claimant had met his burden of proving each element in the prima facie case for an accident / injury claim [1]. The Claimant respectfully requests that the Court affirm the Industrial Commission's 5.17.11 finding that Employer did not dispute that

[1] *See* citations to the record at pp. 3-7 of CL. 11.19.10 post-hearing brief which support the Commission's prima facie case findings.

Claimant suffered an "accident" "in the course" of his employment which "caused" his low back "injury" because Employer failed to meet its burden of proof under Idaho Code §72-732(1).

(2) EMPLOYER FAILED TO MEET ITS BURDEN OF PROVING THAT THE COMMISSION'S FINDINGS OF FACT DID NOT AS A MATTER OF LAW SUPPORT ITS LEGAL CONCLUSION THAT THE CLAIMANT'S INJURY "AROSE OUT OF HIS EMPLOYMENT" AS REQUIRED BY IDAHO CODE §72-732(4)

The Claimant argued at pages 24-27 of his 5.22.13 Reply Brief that Employer had completely failed to meet its burden of proof pursuant to Idaho Code §72-732(4) because it did not identify a single finding of fact from the Commission's 5.17.11 decision in its 4.24.13 Appellant's Brief which did not as a matter of law support the Industrial Commission's ruling that the Claimant's injury arose out of his employment.

After the Claimant put the Employer on notice of this fatal flaw in the Employer's Idaho Code §72-732(4) argument for appealing the Industrial Commission's decision, the Employer **did not make any attempt** in its 6.19.13 Reply Brief **to cure this defect** by specifically identifying those findings of fact in the Commission's 5.17.11 decision which did not, as a matter of law, support the Commission's 5.17.11 ruling that the Claimant's injury arose out of his employment. This Court has held that it will not search the record on appeal and identify assignments of error where the appellant has failed to identify the assignments of error with particularity. A general attack on the findings and conclusions of the Industrial Commission without specific reference to evidentiary or legal errors, is insufficient to preserve an issue. *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, ___ 297 P.3d 1134, 1140 (2013). Employer has made nothing but a general and conclusory attack on the Commission's decision:

> The Industrial Commission's use of the positional risk doctrine **given its findings** was in error, and its 2011 Decision warrants reversal. (ER. 4.24.13 App. Br., p. 33, Ll. 7-8).

Employer failed to address the Claimant's Idaho Code §72-732(4) arguments and did not identify any disputed findings of fact in the Commission's 5.17.11 decision which did not, as a matter of law, support the Commission's ruling that the Claimant's injury arose out of employment because the Commission's findings of fact supported its legal conclusion that the Claimant's injury arose out of his employment [2].

Based on Employer's failure to identify any findings of fact with particularity which did not, as a matter of law, support the Commission's ruling that the Claimant's injury arose out of his employment, the Court should rule that the Employer has either waived its Idaho Code §72-732(4) grounds for appeal or failed to meet its burden of proving that the Commission's decision should be set aside pursuant to requirements of that code section.

(3) THE COURT SHOULD REVERSE THE INDUSTRIAL COMMISSION'S ERRONEOUS CONCLUSION THAT EMPLOYER PRESENTED SUFFICIENT EVIDENCE TO REBUT THE PREMISES PRESUMPTION BECAUSE THAT RULING WAS BASED ON THE WRONG LEGAL STANDARD AND NOT SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE IN THE RECORD

When the Claimant asked this Court to reverse the Industrial Commission's erroneous conclusion that Employer had come forward with sufficient evidence to rebut the premises presumption, the Claimant based his request for a reversal of that ruling on the following 6 assignments of error:

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[2] *See* citation to the Industrial Commission's findings of fact and conclusions of law set forth at pp. 24-27 of Claimant's 5.22.13 Respondent's Brief.

1. The Commission committed plain legal error by applying the wrong legal standard for what an Employer is required to prove to rebut the premises presumption in direct violation of this Court's holding in *Foust v. Birds Eye Div.*, 91 Idaho 418, 419, 422 P.2d 616, 617 (1967);

2. The Commission failed to cite any evidence in the record to support its conclusion that Employer came forward with sufficient evidence to permit reasonable minds to conclude that the subject accident was not one arising out of employment;

3. The Commission failed to cite any legal authority for its legal conclusion that Employer could rebut the premises presumption by having a "reasonable expectation" that the Claimant would arrive on his Employer's premises with his boot laces already pre-tied;

4. The Employer could not have formed a "reasonable expectation" that the Claimant would arrive on his Employer's premises with his boot laces pre-tied because Employer did not have any written policy, procedure, standard, rule or guideline which told the Claimant that he was required to arrive on his Employer's premises with his boot laces pre-tied;

5. The Commission failed to cite any legal authority for its legal conclusion that Employer could rebut the premises presumption by arguing that the risk which caused the Claimant's injury was a "common risk with no particular association to the Claimant's employment"; and,

6. The Commission's finding that Claimant was exposed to a "common risk with no particular association with Claimant's employment" was contradicted by the Commission's own subsequent findings (*See* pp. 15 – 22 of Claimant's 5.22.13 Respondent's Brief).

The Claimant's first assignment of error is the most important one because if the Court agrees with Claimant that it was plain error for the Commission to not apply the *Foust* standard for what an Employer must prove to overcome the premises presumption, then all other assignments of error will be moot. Employer argues that the Claimant's reliance on the *Foust* standard is erroneous because it ignores the plain language of I.R.E. 301:

> Respondent's argument the Industrial Commission committed legal error because it did not apply the 'Foust standard' is erroneous and ignores the plain language of I.R.E. 301 (*See* p. 6, Ll. 25-26 of ER. 6.19.13 Reply Brief).

Employer's argument is both ironic and misleading since it is the Employer who has blatantly ignored the operative language of I.R.E. 301. As pointed out the Claimant in his 5.22.13 Respondent's Brief, by its express terms, the plain language of I.R.E. 301 clearly indicates that the presumption standards of the rule **only apply** in those cases where an Idaho appellate decision has not already defined the presumption standard:

> Presumptions in General in Civil Actions and Proceedings. (a) Effect. **In all civil actions and proceedings, unless otherwise provided for** by statute, **by Idaho appellate decisions** or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. **If the party against whom a presumption operates fails to meet the burden of going forward, the presumed fact shall be deemed proved**. If the party meets the burden of going forward, no instruction on the presumption shall be given, and the trier of fact shall determine the existence or nonexistence of the presumed fact without regard to the presumption (emphasis supplied).

The seminal Idaho appellate decision which has always defined the premises presumption and described the type of evidence that the Employer must come forward with in order to overcome the legal effect of the presumption is *Foust v. Birds Eye Div.*, 91 Idaho 418, 422 P.2d 616 (1967):

> A contrary presumption, that is, that the injury arises out of and in the course of employment, prevails where the injury occurs on the employer's premises, as in the instant case and *Nichols v. Godfrey, supra. (citations omitted)*. In the case at bar there is nothing to indicate that respondent, while on her employer's premises, was engaged in any abnormal unforeseeable activity foreign to her employment, as was

> the situation in *In re Malmquist,* 78 Idaho 117, 300 P.2d 820 (1956); *Neale v. Weaver,* 60 Idaho 41, 88 P.2d 522 (1939); and *Walker v. Hyde,* 43 Idaho 625, 253 P. 1104 (1927). *Id.* 91 Idaho 418, 419, 422 P.2d 616, 617 (1967).

The *Foust* standard clearly defines the type of evidence that that Employer must come forward with in order to overcome the premises presumption. If the Employer fails to present sufficient evidence that the Claimant was engaged in some abnormal unforeseeable activity on his employer's premises that was foreign to his employment at the time of his accident / injury, then Employer has failed to meet the *Foust* standard for rebutting the presumption and the Claimant is entitled to the benefit of the presumption; i.e., his injury must be deemed to arise out of his employment as a matter of law.

Thirty (30) years after this Court established the *Foust* standard for what an Employer must prove to overcome the legal effect of the premises presumption, this Court revisited the premises presumption in *Kessler on Behalf of Kessler v. Payette County*, 129 Idaho 855, 859, 934 P.2d 28, 32 (1997):

> We also recognize that, when an injury occurs on an employer's premises, a presumption that the injury arose out of and in the course of employment arises. *Foust v. Birds Eye Div.,* 91 Idaho 418, 419, 422 P.2d 616, 617 (1967). Because Kessler died at the Payette County Sheriff's office, this presumption clearly applies, and, therefore, the SIF had the burden of producing evidence indicating that Kessler's injury did not arise out of or in the course of his employment. I.R.E. 301. See also *Evans v. Hara's, Inc.,* 123 Idaho 473, 478, 849 P.2d 934, 939 (1993). *Kessler on Behalf of Kessler v. Payette County*, 129 Idaho 855, 859, 934 P.2d 28, 32 (1997).

Even though the *Kessler* Court did not expressly or impliedly overrule *Foust* when it referred to I.R.E. 301, the Industrial Commission and the Employer have both interpreted the *Kessler* Court's reference to I.R.E. 301 as an expression of the Court's intent to overrule *Foust* and lower the standard for what an Employer must prove to rebut the premises presumption:

> Since its decision in *Foust*, the Supreme Court has not recognized Respondent's so-called '*Foust* standard' regarding the required standard of going forward, but has instead followed the rule set forth in I.R.E. 301. *See Kessler,* 129 Idaho at 859, 934 P.2d at 32... (*See* p. 7, Ll. 10-13 of Employer's 6.19.13 Reply Brief).
>
> Therefore, in order to overcome the presumption that the accident is one arising out of and in the course of employment, Defendant must come forward with proof sufficient to permit reasonable minds to conclude that the accident is not one arising out of and in the course of employment (R. Vol. 1, p. 37, Ll. 17-20).

The Industrial Commission and the Employer have both taken the position that the *Kessler* Court's bald citation to I.R.E. 301 can only mean that the *Foust* standard no longer applies and the Employer no longer has to prove that the Claimant was engaged in some abnormal unforeseeable act on his employer's premises that was completely foreign to his employment in order to overcome the legal effect of the premises presumption. The Court should reject this interpretation of *Kessler* and reverse the Industrial Commission's refusal to apply the *Foust* standard for the following reasons:

1. The *Kessler* Court cited *Foust* with approval as the seminal case which still defined the premises presumption standards 30 years after *Foust* was decided;

2. The *Kessler* Court merely cited I.R.E. 301 without analysis or discussion and did not expressly or impliedly hold that its reference to I.R.E. 301 was intended to supersede, replace, overrule or lower the *Foust* standards;

3. By its express terms, I.R.E. 301 only defines the presumption and rebuttal standards in those cases where no Idaho appellate decisions have already defined the applicable standards. Since *Foust* already defined the presumption rebuttal standards 30 years before the *Kessler* Court's citation to I.R.E. 301, the *Foust* standards still control; and,

4. This Court has construed the premises presumption standards from *Foust*, *Kessler* and I.R.E. 301 as being perfectly compatible and not mutually exclusive as evidenced by this Court's recent citation to both *Foust* and *Kessler* as the seminal cases which still define the premises presumption standards:

> When an injury occurs on an employer's premises, a presumption arises that the injury arose out of and in the course of employment. *Kessler,* 129 Idaho at 859, 934 P.2d at 32 (1997); *Foust v. Birds Eye Div.,* 91 Idaho 418, 419, 422 P.2d 616, 617 (1967). *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325, 333, 179 P.3d 288, 296 (2008).

Since this Court's holdings in *Foust, Kessler and Stevens-McAtee* and the language of I.R.E. 301 all deal with the standards which govern application of the premises presumption, the Court should construe its holdings as being consistent with the language of I.R.E. 301 whenever possible:

> Where statutes are in pari materia (relating to the same subject matter), they should be construed together to give effect to legislative intent. Dewey v. Merrill, 124 Idaho 201, 204, 858 P.2d 740, 743 (1993). *State, Dep't of Health Welfare ex rel. Lisby v. Lisby,* 126 Idaho 776, 779, 890 P. 2d 727, 730 (1995).

If this Court construes its holding in *Foust, Kessler* and *Stevens-McAtee* as being consistent with the language of I.R.E. 301, the Court should hold that in order to overcome the premises presumption, the Employer must come forward with sufficient evidence to prove that the Claimant was engaged in some abnormal unforeseeable activity on his employer's premises that was foreign to his employment at the time he suffered an injury. If the Employer fails to present this type of evidence, then reasonable minds could not conclude that the Employer has presented sufficient evidence to overcome the presumption "and the presumed fact [that the Claimant's injury arose out of his employment] shall be deemed proved" (I.R.E. 301).

The overwhelming evidence in this case proves that the Claimant was performing an act required by his Employer's safety policies or reasonably incidental to the performance of his job duties when he bent over to tie the laces on his work boots on 12.18.09 and suffered his low back

injury [3]. Since there was no evidence in the record that Employer could rely on to meet the *Foust* standard and overcome the legal effect of the premises presumption, the Commission was forced to apply the wrong legal standard based on the *Kessler's* Court's reference to I.R.E. 301.

All of this legal maneuvering became necessary because Employer denied this claim on the **exclusive legal ground** that the Claimant's injury did not arise out of his employment (CL. 5.17.12. EX. 8; EX. 9, 009006). If the *Foust* standard controlled, the Commission would have no choice but to give the Claimant the benefit of the premises presumption and rule that the Claimant's injury arose out of his employment as a matter of law because there was no evidence in the record that the Claimant was engaged in some abnormal unforeseeable act foreign to his employment when he bent over to tie his work boot laces on his Employer's premises on 12.18.09 .

This is exactly how Referee Powers decided the case and there was no need to go any further and accept the Employer's invitation to review 80 + years of "employment risk" *versus* "personal risk" *versus* "neutral risk" *versus* "equal risk" *versus* "common risk" *versus* "positional risk" case law on the "arise out of employment" issue (R., Vol. I, pp. 20-31).

The Industrial Commission must have realized that if it properly applied the *Foust* standard for what is required to overcome the premises presumption, that would be dispositive of this entire case and render moot all of Employer's "greater risk" arguments on the "arise out of employment" issue. Of course, if this case had been decided early based on the proper application of the *Foust* standards, that would deprive Employer of the opportunity to use this

[3] *See* discussion and citations to the record set forth at pages 15-22 of Claimant's 5.22.13 Respondent's Brief.

case on appeal to attempt to convince this Court that it should overrule its prior rejection of the "greater risk" doctrine in *Spivey v. Novartis Seed*, 137 Idaho 29, 43 P.3d 788 (2002).

Since the Commission evidently wanted this Court to revisit its rationale for its rejection of the "greater risk" doctrine in *Spivey*, the Commission had to reject Referee Powers' proper application of the *Foust* premises presumption standards (R., Vol. I, pp. 23 – 28) and find that Employer had presented sufficient evidence to overcome the presumption based on a lower standard that the Commission fashioned from the *Kessler* Court's mere reference to I.R.E. 301.

This Court should reverse the Commission's refusal to apply the *Foust* standards to the premises presumption and hold that *Foust*, *Kessler* and I.R.E. 301 presumption standards are all compatible and required Employer to prove that the Claimant was engaged in some abnormal unforeseeable act on his employer's premises that was completely foreign to his employment at the time he suffered his injury in order to overcome the legal effect of the premises presumption.

The Industrial Commission and the Employer have also tried to avoid application of the *Foust* standard by misreading dicta from *Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 990 P.2d 738 (1999):

> Even so, the mere fact that an injury occurs on the employer's premises is not an exclusive test for compensability, but rather is only one factor to be considered. In re Malmquist, 78 Idaho 117, 300 P.2d 820 (1956). To establish that the accident arose out of and in the course of employment, the fact that an injury occurs on the employer's premises must be accompanied by a showing of a causal connection between the conditions existing on the employer's premises and the accident involved. Nichols v. Godfrey, 90 Idaho 345, 350, 411 P.2d 763, 765 (1966). See also Kessler, supra, 129 Idaho at 860, 934 P.2d at 31. (R. Vol. I, p. 38, Ll. 5-12).

The Industrial Commission interpreted the dicta from *Dinius* as follows:

> *Foust* creates a presumption that an accident occurring on employer's premises arises out of and is in the course of employment. However, from the quoted language, the *Dinius* Court seems to conclude that even if the injured worker demonstrates that the accident occurred on employer's premises, he must also adduce evidence showing a causal connection between the conditions existing on the employer's premises and the accident involved. Arguably, this undermines that portion of the *Foust* rule creating the presumption that an accident occurring on the employer's premises 'arises' out of employment (R. Vol. I, p. 38, Ll. 13-19).

Recognizing another opportunity to avoid the proper application of the *Foust* standard for what proof is required to overcome the premises presumption, Employer has jumped on the *Dinius* bandwagon:

> The Court's holding in *Foust* is undermined by its subsequent decision in *Dinius v. Loving Care and More, Inc.*, where it stated that despite the premises presumption, a claimant still has the burden of showing a causal connection between the conditions existing on the employer's premises and the accident involved. (*See* p. 7, Ll. 16-19 of ER. 6.19.13 Reply Brief).

This Court should reject the Industrial Commission's and the Employer's attempts to use the dicta from *Dinius* to avoid application of the *Foust* rule for the following reasons:

1. The *Dinius* Court cited *Foust* with approval and did not express any intent to overrule the *Foust* standards;

2. The *Dinius* Court distinguished the facts in *Dinius* where the Claimant was injured on her employer's premises by the acts of a *third-party* who was not a co-worker from the facts in *Foust* where the Claimant was injured on her employer's premises by a *co-worker*;

3. The *Dinius* Court held that it would have been plain error for the Industrial Commission to apply the premises presumption to the facts in *Dinius* since the Industrial Commission had failed to first make the predicate finding that the Claimant's injuries occurred on her Employer's premises;

4. Since the Industrial Commission and the Court could not apply the premises presumption in *Dinius*, the statement that the Industrial Commission and the Employer have relied on to challenge the *Foust* standard was *merely dicta* and not binding precedent;

5. The Commission based its holding that the Claimant's injury did not arise out of her employment on the Employer's argument that the Claimant was ***"not subject to a special risk incident to her employment"*** *Dinius*, *supra,* at 133 Idaho 572, 576, 990 P.2d 738, 742 (1999)***;***

6. The Court ruled that "Dinius failed to show that she was injured because of ***exposure to a risk incident to her employment***, see Colson v. Steele, 73 Idaho 348, 252 P.2d 1049 (1953), or ***exposure to a hazard to which she would not have been exposed outside her work environment***" *Id.,* and,

7. Three (3) years after the Court decided *Dinius*, the Court specifically rejected the greater risk, special risk, peculiar risk, exposure to a peculiar hazard arguments that Employers were trying to import from the occupational disease theory in order to make accident / injury claims more difficult to prove in *See Spivey v. Novartis Seed*, 137 Idaho 29, 43 P.3d 788 (2002).

The Industrial Commission and the Employer have both given an interpretation to the *Dinius dicta* that would nullify the premises presumption and make it essentially meaningless. Based on this interpretation, even in those cases where the Employer has failed to come forward with sufficient evidence to overcome the premises presumption, the presumed fact would not be deemed to be true because the burden would then shift back to the Claimant who would have to come forward again and present additional evidence that his injury arose out of his employment by showing a causal connection between the conditions existing on the employer's premises and the accident involved.

Based on the rationale of the Court's decision in *Dinius*, the Industrial Commission and the Employer would like to see this Court rule that the Claimant can only show the required "causal connection between the conditions existing on the employer's premises and the accident involved" by showing exposure to a "special risk incident to employment" or by "exposure to a hazard to which she would not have been exposed outside her work environment" *Dinius*, *supra*,

at 133 Idaho 572, 576, 990 P.2d 738, 742 (1999). However, just 3 years after *Dinius* was decided, this Court expressly rejected the "special risk", "greater risk", "exposure to a peculiar hazard" arguments in *Spivey v. Novartis Seed*, 137 Idaho 29, 43 P.3d 788 (2002):

> The Commission determined that the record supported the decision and declined the defendants' 'invitation to introduce risk analysis from the occupational disease legal theory into the accident and injury legal theory.' *Spivey, supra,* 137 Idaho 32, 43 P.3d 791 (2002)....
>
> Appellants additionally urge that the Commission erred in its refusal to utilize a greater risk analysis in this case when determining whether the respondent was entitled to benefits. ... Because her job did not place her at greater risk for injury than her daily routine, appellants contend that there is not substantial and competent evidence to support the Commission's findings.
>
> The Commission's refusal to utilize a greater risk analysis in reaching its holding was proper. The statutory language is clear on its face as to what is required of a claimant seeking compensation for an injury sustained during an accident that arose out of and in the course of employment. *Id.* 137 Idaho 34, 43 P.3d 793.
>
> In this case, the appellants suggest a return to the rationale of *Wells* by requiring Spivey to prove that her job duties placed her at a greater risk for injury than that encountered by the general public performing the same physical motions. However, a greater risk analysis is no longer required of a claimant in light of *Mayo* and *Kessler.* ...
>
> The respondent, Spivey, met her burden by establishing that she sustained an injury that resulted from an accident that arose out of and in the course of her employment. A greater risk analysis is not required within the context of accident/injury cases to determine a compensable injury. *Ibid*, 137 Idaho 35, 43 P.3d 794.

Since this Court held in *Spivey* that the "greater risk" doctrine can no longer be applied in the context of accident / injury claims, the Industrial Commission's reliance on the *Dinius* dicta as a basis to overrule the *Foust* rule constituted plain legal error and should be reversed by this Court on appeal.

The second assignment of error that the Claimant raised in his 5.22.13 Respondent's brief

was that the Commission did not cite any evidence in the record to support its conclusion that Employer had come forward with sufficient evidence to rebut the premises presumption. The Commission merely stated a bald conclusion:

> Regardless, we think the question of the current status of the *Foust* presumption is mooted in this case in view of our conclusion that Defendant's have come forward with evidence sufficient to permit reasonable minds to conclude that the subject accident is not one arising out of and in the course of Claimant's employment. (R., Vol. I, p. 38, Ll. 20-23).

On this pivotal issue, the Commission did cite any evidence in the record that it was relying on to support its conclusion that Employer had come forward with sufficient evidence to overcome the premises presumption. Without knowing what evidence the Commission based this legal conclusion on, the Court cannot determine if the evidence was substantial and competent.

> To properly review an order of the Commission under the appropriate standard of review, it is essential that the order of the Commission be based upon reviewable findings of fact and conclusions of law. *Iverson v. Farming,* 103 Idaho 527, 530, 650 P.2d 669, 672 (1982). *Curr v. Curr,* 124 Idaho 686, 690, 864 P.2d 132, 137 (1993).

The Court should reverse the Commission's conclusion that Employer overcame the premises presumption because that bald conclusion was not based on substantial and competent evidence in the record.

The 3rd assignment of error that the Claimant made to the Commission's ruling that the Employer came forward with sufficient evidence to overcome the premises presumption was that the Commission did not cite any legal authority to support its legal conclusion that the Employer can overcome the premises presumption by arguing that it has a "reasonable expectation" that its employees will pre-tie their boot laces before entering upon their Employer's premises. Since the Commission's conclusion was not supported by any legal authority, it was plain error to

apply this new legal standard for what is required to overcome the premises presumption and the Court should reverse this ruling on appeal.

The 4th assignment of error that the Claimant made to the Commission's ruling that the Employer came forward with sufficient evidence to overcome the premises presumption was that there was no substantial and competent evidence in the record to support the Commission's conclusion that Employer had a "reasonable expectation" that its Employees would arrive at work with their boot laces pre-tied:

Q. Can you show me any written policy that UPS has that requires the worker to tie his work boots before he arrives to work?
A. No. Again, that's an expectation... (McGuire Dep, p. 49, Ll. 8-11).
Q. Right. But in your appearance guideline that you have here which describe the uniform, it doesn't say anything about showing up to work with your boot laces tied, does it?
A. No. It shows you that you have to have the appropriate shoes, and they don't have to have laces. They could be boots, so long as you meet those requirements. The expectation is you would tie your shoes.
Q. But it's an unwritten expectation?
A. Yes. It is a common sense expectation.(McGuire Dep, p. 50, Ll. 11 - 21).
Q. I believe Counsel asked you a question, if UPS had any specific standards that required it's workers to tie their shoes before they came to work. Do they?
A. No.
Q. So you don't have any written policy, procedure, standard, rule or guideline that tells Mr. Vawter he has to show up on the premises with his work boots already pre tied?
A. No. There is nothing written. It is a common expectation. (McGuire Dep. p. 55, L. 16 – p. 56, L. 2).

Even though the Employer micro-manages every aspect of its Employees' jobs and has detailed appearance guidelines and footwear standards, when it comes to its boot lace tying expectations, the Employer expects its Employees to read its mind and always arrive for work on the Employer's premises with their boot laces pre-tied. As argued by Claimant in his 5.22.13 Response Brief, to be objectively reasonable, the Employer's expectations must be

communicated to the employee. *Sadid v. Idaho State University*, 154 Idaho 88, _____ ,294 P.3d 1100, 1107 (2013).

There is no evidence in the record which proves that Employer told the Claimant in a written policy, procedure, standard, rule or guideline that he was required to tie the laces on his work boots before he entered upon his employer's premises. The Court should reverse the Commission's finding that the Employer overcame the premises presumption based on its "reasonable expectations" that the Claimant would pre-tie the laces on his work boots before entering upon his Employer's premises because the evidence in the record proves that Employer's expectations were not reasonable since they were never communicated to the Employee.

The 5th assignment of error that the Claimant made to the Commission's ruling that the Employer came forward with sufficient evidence to overcome the premises presumption was that the Commission did not cite any legal authority for its legal conclusion that Employer could rebut the premises presumption by arguing that the risk which caused the Claimant's injury was a "common risk with no particular association to the Claimant's employment". Since the Commission's conclusion was not supported by any legal authority, it was plain error to apply this new legal standard to overcome the premises presumption and the Court should reverse this ruling on appeal.

The final assignment of error that the Claimant made to the Commission's ruling that the Employer came forward with sufficient evidence to overcome the premises presumption was that the Commission's finding that Claimant was exposed to a "common risk with no particular

association with Claimant's employment" was contradicted by the Commission's own subsequent findings that were supported by substantial and competent evidence in the record:

> Here, the risk of injury in question is connected to the employment because it was encountered by Claimant as result of the Claimant's performance of a task that was either part of his work, or reasonably incidental thereto (R., Vol. I, p. 45, Ll. 20-23).
>
> It strains credulity to suggest that the risk of injury associated with the tying of the shoelaces was not therefore one which followed as a natural incident of the work. Claimant needed to have his shoes tied to perform his work, and the injury that he suffered as a result of performing this task is assuredly connected to his employment. This is not a case where the evidence establishes an absence of a work connection, or where the evidence is such that it cannot be ascertained whether Claimant's injury was occasioned as a result of a risk personal to him versus an employment connected risk (R., Vol. I, p. 46, Ll. 6-12).
>
> However true this may be, the fact of the matter is that Claimant suffered this particular injury as the result of his attempts to accommodate the requirements of his job. Because Claimant was necessarily required to tie his shoelaces before starting work, his job clearly created an actual risk which ultimately resulted in Claimant's injury (R., Vol. I, p. 46, Ll. 16-20).
>
> Even though we have found that Claimant's employment did, indeed, subject him to an actual risk of injury due to workplace demands which required of him that his shoelaces be tied ...(R., Vol. I, p. 47, Ll. 10-12).
>
> In summary, we find that the risk of injury at issue in the instant matter is likely not a neutral risk, but, instead, a risk of injury that bears a causal connection to the work that Claimant was hired to perform (R., Vol. I, p. 49, Ll. 24-26).

The Commission committed plain legal error when it refused to apply the *Foust* premises presumption standards to the facts of this case. Just 6 months after the Commission entered its 5.17.11 decision in this case, the Commission acknowledged that this Court's holding in *Foust* defines the standard for what an Employer is required to prove in order to overcome the premises presumption:

> An accident involving a worker occurring on the employer's premises is presumed to arise out of and in the course of employment. Foust v. Birds Eye Division of General

Foods Corp., 91 Idaho 418, 422 P.2d 616 (1967). This presumption can be rebutted by proof that the employee, while on the employer's premises, was engaged in unforeseeable, abnormal activity foreign to his employment. *Mudge v. GNP of Idaho, Inc., and Tower Insurance Company of New York*, 2011 WL 6042994, I.C. No. 2010-025109, p. 7, L. 32 – p. 8, L. 1 (Filed: 11.14.11).

The Court should reverse the Commission's erroneous conclusion of law that Employer successfully rebutted the premises presumption because that conclusion was based on the Commission's application of the wrong legal standard and on erroneous legal conclusions that were not supported by substantial and competent evidence or directly contradicted by the Commission's subsequent findings.

After reversing the Commission's ruling that Employer presented sufficient evidence to overcome the premises presumption, the Court should rule that the Claimant met his burden of proving a compensable claim as a matter of law since Employer denied this claim on the exclusive legal grounds that Claimant's injury did not arise out of employment and that "presumed fact shall be deemed proved". I.R.E. 301.

4. THIS COURT SHOULD REVERSE THE COMMISSION'S USE OF COLLATERAL ESTOPPEL IN ITS 12.10.12 ORDER ON RECONSIDERATION TO PREVENT THE CLAIMANT FROM RECOVERING 100% OF ALL PAST DENIED MEDICAL BENEFITS FROM EMPLOYER BECAUSE EMPLOYER FAILED TO PROVE ALL OF THE ELEMENTS IN THE PRIMA FACIE CASE FOR APPLICATION OF COLLATERAL ESTOPPEL

The Claimant listed 10 assignments of error in his 5.22.13 Respondent's Brief which explained why it was plain error for the Industrial Commission to apply the doctrine of collateral estoppel for the first time in its 12.10.12 Order On Reconsideration (*See* pages 47-48 of Claimant's 5.22.13 Respondent's Brief and Claimant's 12.19.12 Brief In Support of Motion For Reconsideration of 12.10.12 Order On Reconsideration at R., Vol. III, pp. 465-494). Before

explaining how Employer failed to meet its burden of proving each of the 5 substantive elements in the doctrine of collateral estoppel, the notice issue must first be addressed.

Employer argues that the issue of collateral estoppel was properly noticed for the 5.17.12 Hearing because the Claimant confirmed that the parties had discussed the issues of res judicata and / or collateral estoppel in their 2.10.12 telephone conference with the Industrial Commission in his 2.13.12 request to include the Idaho Code §72-719 manifest injustice issue for resolution at the 5.17.12 Hearing (R., Vol. II, pp. 254-257) (*See* p. 35, L. 19- p. 36, L. 12 of Employer's 6.19.13 Reply Brief). What Employer failed to discuss is how the complexion of the issues changed after 2.13.12 and Employer abandoned the collateral estoppel issue.

When the Industrial Commission entered its Notice of the 5.17.12 Hearing on 3.17.12 it did not list *collateral estoppel / issue preclusion* as an issue to be heard and decided at the 5.17.12 hearing as required by Idaho Code §72-713.

6. Whether Claimant is entitled to past-denied medical care benefits, or whether the issue of Claimant's entitlement to such benefits is precluded under the doctrine of res judicata (R., Vol. II, p. 259, Ll. 6-8).

At the commencement of the 5.17.12 Hearing, **all of the parties explicitly agreed** that Employer had limited its affirmative defenses to res judicata and issue number 6 in the Commission's 3.7.12 Notice of Hearing only addressed the issue of res judicata:

Commissioner Baskin:

The issues noticed up for today's hearing have been set forth in the Commission's notice of hearing dated March 7, 2012, numbered one through nine. I won't go through reading all of those issues, but would ask the parties to review that order, make sure we are all on the same page as to whether that fairly encapsulates the issues we have talked about. Mrs. Veltman?
MRS. VELTMAN: Yes, it does.
COMMISSIONER BASKIN: Mr. Augustine?
MR. AUGUSTINE: Yes, it does.

COMMISSIONER BASKIN: Mr. Kallas?
MR. KALLAS: Yes, Your Honor, it does.
COMMISSIONER BASKIN: Let me pose a couple of questions about number six, whether claimant is entitled to past denied medical care benefits or whether the issue of claimant's entitlement to such benefits is precluded **under the doctrine of res judicata.** Mr. Kallas, are we talking about additional medical bills that were incurred from the date of accident to the date of the last hearing that you have subsequently discovered?
MR. KALLAS: Yes, Your Honor. That's Claimant's Hearing Exhibit No. 14 today. Those are medical bills that were incurred by the claimant from date of injury on 12/18/09 to date of the Industrial Commission's original decision on 4/17/11 [sic][5.17.11].
COMMISSIONER BASKIN: What is the approximate amount of those bills? Approximately.
MR. KALLAS: I believe it's -- I believe it's around 24,000 dollars.
COMMISSIONER BASKIN: Okay. And the issue is whether the claimant is precluded from making a claim for those additional **bills under the doctrine of res judicata. Correct, Mrs. Veltman?**
MRS. VELTMAN: **That is correct.** (Tr. 4/16-5/24) (emphasis supplied).

After all of the parties explicitly agreed that the doctrine of res judicata was the only affirmative defense being raised by Employer to avoid the payment of all of the Claimant's accident-related medical bills, mileage, per diem and lodging expenses listed in Claimant's 5.17.12 Hearing Exhibits No.'s 14, 15 and 16, the Claimant limited his legal analysis and argument at page 25-27 in his 7.12.12 post hearing brief to the doctrine of res judicata. When Employer filed its 8.15.12 post-hearing response brief, Employer likewise limited its argument to res judicata at pages 24-25 and did not discuss the doctrine of collateral estoppel. The Industrial Commission rejected Employer's res judicata arguments and did not analyze or discuss the doctrine of collateral estoppel in its 9.28.12 / 12.5.12 decision (R., Vol. III, p. 429, L. 19 – p. 432, L. 15).

Based on that record which makes it absolutely clear that **the parties abandoned the issue of collateral estoppel** as a disputed issue for resolution at the 5.17.12 Hearing, there was

no substantial and competent evidence in the record to support the Industrial Commission's "belief that by raising the doctrine of res judicata, Employer raised the issue of collateral estoppel as well" (R., Vol. III, p. 453, Ll. 19-22). This finding should be reversed on appeal.

Even though the affirmative defense of res judicata was the only issue listed in the Industrial Commission's 3.7.12 Notice of Hearing, the only affirmative defense **explicitly agreed** to by the parties at the commencement of the 5.17.12 Hearing, the only affirmative defense addressed by the Claimant in his 7.27.12 post-hearing Opening Brief, the only affirmative defense addressed by Employer in its 8.15.12 post-hearing Reply Brief and the only affirmative defense discussed by the Industrial Commission in its 9.28.12 / 12.5.12 decisions, Employer asks this Court to rule that the mere listing of the collateral estoppel issue in the Claimant's 2.13.12 request to include the Idaho Code §72-719 manifest injustice issue was sufficient to preserve the collateral estoppel issue. The Court should reject the Employer's argument because the mere listing of an issue which is not supported by argument or authority is not sufficient to preserve the issue *Bettwieser v. New York Irrigation Dist.*, 154 Idaho 317, ____ 297 P.3d 1134, 1140 (2013).

Even if the Court finds that the Claimant received adequate notice that collateral estoppel would be a disputed issue to be heard decided at the 5.17.12 Hearing, the Court should still reverse the Industrial Commission's application of collateral estoppel to the facts of this case because **Employer failed to meet it burden of proving each element in the prima facie case for application of collateral estoppel.** This Court has defined the 5 elements of collateral estoppel as follows:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. *Rodriguez,* 136 Idaho at 92, 29 P.3d at 403. This Court finds that collateral estoppel does not bar Royal's claim seeking apportionment of liability to ISIF for Stoddard's total and permanent disability because the issues are not identical in the two cases. *Stoddard v. Hagadone Corp.,* 147 Idaho 186, 191, 207 P.3d 162, 167 (2009).

Element No. 1: A Full and Fair Opportunity

The Industrial Commission found that the Claimant had a full and fair opportunity to litigate the **full extent of all of his past medical benefits** at the 9.28.10 Hearing The Commission listed 2 grounds to support that conclusion:

1. The Claimant could have been more diligent in collecting all of his past medical billing statements; and,

2. The Claimant could have couched his demand differently in order to obviate his current predicament (R., Vol. III, p. 456, Ll. 6-12).

The grounds cited by the Commission to support its finding that the Claimant had a full and fair opportunity to adjudicate all of his past medical benefit claims at the 9.28.10 Hearing are directly contradicted by the evidence in the record. The Employer's 5.12.10 Motion To Bifurcate forced the Claimant to proceed to an expedited Hearing quickly and serve the Defendants with his Hearing Exhibits on 9.18.10 just 59 days after his 7.21.10 lumbar fusion surgery when all of his final medical billing statements and / or subrogation ledgers from his health insurance carrier were not yet available:

> When parties request bifurcation, **they are requesting an expedited determination** of certain issues, and they should expect to be held accountable for their responsibilities under such a determination once it is made. The policy of the

> workers' compensation law is to provide injured workers with sure and certain relief. Claimant is correct that an important aspect of sure and certain relief is prompt payment of benefits. (R., Vol. II, p. 211, Ll. 1-6) (emphasis supplied).

Employer should have anticipated that one of the risks associated with its 5.12.10 request for an expedited Hearing would be that the Claimant would not be able to gather every single medical bill within 59 days after his 7.21.10 lumbar fusion surgery in order to serve all of his Hearing Exhibits on Defendants at least 10 days prior to the 9.28.10 Hearing as required by J.R.P. 10(C)(1) and adjudicate all of his denied medical benefit claims at the 9.28.10 Hearing.

After Employer denied this claim on 1.8.10, the Claimant called his UPS Supervisor, Dax Wilkinson. Mr. Wilkinson told the Claimant to process all of his denied accident-related medical benefits through his Health Insurance Plan with the Oregon Teamsters Trust (Tr. 2, p. 90, L. 1 – p. 94, L. 18). The Claimant complied with his Supervisor's instructions and processed all of his accident-related denied medical bills through his Oregon Teamsters Trust / Blue Cross – Blue Shield health insurance plan, but that proved to be a complicated, sometimes adversarial and time consuming process.

The Claimant explained at the 5.17.12 Hearing that his Oregon Teamsters Trust insurance policy had a contract provision that placed a $10,000.00 cap on the medical benefits that the Claimant could receive if he was contesting the denial of his worker's compensation claim. After the Claimant exceeded the $10,000.00 cap, the Oregon Teamsters Trust terminated his medical benefits and rejected claims for the payment of further medical benefits from his medical providers. The Claimant then had to appeal to the Board of Directors of the Oregon Teamsters Trust and obtain a hardship waiver of the $10,000.00 cap in order to reverse the

Board's termination of benefits and restore his eligibility to receive continuing medical benefits (Tr. 2, p. 90, L. 15 – p. 91, L. 5; p. 106, L. 9 – P. 107, L. 10).

The Claimant testified that he did not submit his medical bills to the Oregon Teamsters Trust for processing and payment. The Claimant never saw his medical bills and just assumed that his medical providers were sending his medical bills directly to the Oregon Teamsters Trust for processing and payment (Tr. 2, p.91, L. 20 – p. 92, L. 3). When Employer's attorney asked the Claimant why he did not request that his 5.17.12 Exhibit No. 14 medical bills be paid at the 9.28.10 expedited / bifurcated Hearing, the Claimant testified that he did not have his most recent bills to support a request for payment and did not know what the total amount of his bills was at the time of the 9.28.12 expedited / bifurcated Hearing (Tr. 2, p. 103, Ll. 10-14).

The Claimant explained that he did not know about the $24,627.80 in past medical bills listed in Claimant's 5.17.12 Hearing Exhibit No. 14 at the time of the expedited bifurcated Hearing on 9.28.10 because the statement / subrogation ledger that he received from the Oregon Teamsters / Blue Cross – Blue Shield only listed the $149,033.68 in medical bills that were adjudicated at the 9.28.10 Hearing as Claimant's Hearing Exhibit No. 7 (Tr. 2, p. 103, L. 25 – p. 104, L. 4; p. 104, Ll. 17-20).

The Claimant explained that he could not adjudicate the past denied medical bills listed in Claimant's 5.17.12 Hearing Exhibit No. 14 at the 9.28.10 Hearing because the Oregon Teamsters / Blue Cross- Blue Shield had not received the bills from his medical providers from his 7.21.10 lumbar fusion surgery or if the Oregon Teamsters had received the bills they had not yet processed them for payment (Tr. 2, p. 104, Ll. 4-6). The Claimant also explained that he did not

understand the process of how his medical providers generated their bills and submitted them to the Oregon Teamsters Trust / Blue-Cross-Blue Shield for processing and payment. The Claimant testified that for all he knew, his medical providers may not have sent his bills to the Oregon Teamsters for payment in a timely manner or, if they did, the Oregon Teamsters may have found some kind of discrepancy or problem with the bill and sent it back to the provider for clarification before the bill could be paid (Tr. 2, p. 104, Ll. 4-9).

The Claimant testified that he did not really understand the mechanics of how the medical provider bill submission, bill processing and bill payment procedure worked between his Idaho medical providers and Oregon Teamsters Trust / Blue Cross – Blue Shield (Tr. 2, p. 104, Ll. 6-9). However, the Claimant did know that after his Idaho medical providers submitted their bills to Idaho Blue Cross-Blue Shield, those bills would have to be processed in Idaho first before they were sent to the Oregon Blue Cross-Blue Shield for final processing and payment (Tr. 2, p. 104, Ll. 10 – 17).

The Claimant's **unrefuted testimony** at the 5.17.12 Hearing proves that he did not have a full and fair opportunity to adjudicate all of his past denied bills at the 9.28.10 expedited / bifurcated hearing because he did not know the amount of those bills at the time when his Hearing Exhibits were due 10 days before Hearing on 9.18.10. as required by J.R.P. 10(C)(1). This Court should reverse the Industrial Commission's finding that the Claimant had a full and fair opportunity to adjudicate the full extent of all of his past denied medical benefit claims at the 9.28.10 bifurcated hearing and its finding that the Claimant should have been more diligent in collecting all of his past denied medical benefits (R., Vol. III, p. 456, Ll. 6-7).

The other ground relied on by the Commission to support its finding that the Claimant had a full and fair opportunity to litigate the full extent of all of his past denied medical benefit claims was that the Claimant "could have couched his demand differently such as to obviate the current predicament" (R., Vol, III, p. 456, Ll. 9-10). The Commission found that "in pursuing his claim for medical benefits Claimant could have simply requested that the Commission enter an order holding Employer responsible for all of the accident-related medical bills incurred by Claimant to the date of hearing" (R., Vol. III, pp. 455, L. 31 – p. 456, L. 1).

What is ironic is that Claimant did exactly what the Commission chides him for not doing. The Claimant submitted **at least 3 requests** to the Commission for entry of a broad Order based specifically on this Court's holding in *Neel v. Western Construction*, 147 Idaho 146, 206 P.3d 852 (2009) which would have required Employer to pay 100% of the invoiced amount of ALL past medical benefits incurred by Claimant from date of injury to date when the Commission found this claim compensable:

Request No. 1:

> Based on the Supreme Court's hold [sic][holding] in *Neel*, the Defendants are liable for 100% of the invoiced amount of the medical expenses incurred by the Claimant from the date of his 12.18.09 low back injury to the date when the Industrial Commission enters its final and appealable order finding this claim compensable. At the time of the September 28, 2010 Hearing, the Claimant presented undisputed evidence proving that he has incurred at least $149,033.68 in past denied medical bills in connection with his 12.18.09 industrial accident / low back injury (Cl. Ex. 7) (Tr., p. 42, L. 18 – p. 45, L. 1).
>
> The $149,033.68 in denied past medical expenses incurred by the Claimant and adjudicated at the 9.28.10 Hearing may not represent 100% of all past medical expenses incurred by the Claimant from the date of his 12.18.09 industrial accident to the date when the Industrial Commission enters its final and appealable order finding this claim compensable. However, the Claimant is entitled to an Order from the Industrial Commission which sets forth the sum certain of $149,033.68 in past

medical expenses that were presented to the Industrial Commission as Claimant's Hearing Exhibit No. 7 and adjudicated at the 9.28.10 Hearing so that the Claimant can obtain an enforceable judgment pursuant to Idaho Code §72-735 upon which interest may be calculated pursuant to Idaho Code §72-734. (*See* p. 25 of Claimant's 11.19.10 post-hearing Brief) (underline supplied).

Request No. 2:

The Defendants are liable for the payment of 100% of the invoiced amount of all past medical expenses incurred by Claimant from the date of his 12.18.09 industrial injury to the date when the Industrial Commission enters a final and appealable order finding this claim compensable (*See* p. 29 of Claimant's 11.19.10 post-hearing Brief).

Request No. 3:

The Industrial Commission should Order the Defendants to pay 100% of the invoiced amount of all past medical expenses incurred by Claimant from the date of his 12.18.09 industrial injury to the date when the Industrial Commission enters a final and appealable order finding this claim compensable in accordance with the Idaho Supreme Court's holding in *Neel v. Western Construction*, 147 Idaho 146, 206 P.3d 852 (2009) (*See* p. 29 of the Claimant's 12.28.10 Reply Brief).

The 2 grounds that the Industrial Commission relied on to support its finding that the Claimant had a full and fair opportunity to litigate the full extent of all of his past denied medical benefits at the 9.28.10 Hearing are directly contradicted by the unrefuted evidence in the record. Since the Commission's findings were not supported by substantial and competent evidence, this Court should reverse the Commission's full and fair opportunity finding and its application of collateral estoppel to deprive the Claimant of the medical benefits he is entitled to pursuant to Idaho Code §72-432 and this Court's holding in *Neel*.

Element No. 2: Identical Issues

The past denied medical benefit issue before the Industrial Commission at the 9.28.10 Hearing was listed in the Commission's 7.20.10 Notice of Hearing as follows.

3. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof ? (R., Vol. I, p. 18, Ll. 10-11).

The past denied medical benefit issue before the Industrial Commission at the 5.17.12 Hearing was listed in the Commissions' 3.7.12 Notice of Hearing as follows:

6. Whether Claimant is entitled to past-denied medical care benefits, or whether the issue of Claimant's entitlement to such benefits is precluded under the doctrine of res judicata (R., Vol. II, p. 259, Ll. 6-8).

Based on a plain reading of the language used by the Industrial Commission in its Notices of Hearing, it is obvious that the medical benefit issues listed in the Industrial Commission's Notices of Hearing were **not identical** as erroneously found by the Industrial Commission in its 12.10.12 Order On Reconsideration (R. Vol. III, p. 456, Ll. 13-17). The Court should reverse the Commission's identical issue finding and its application of collateral estoppel.

Element No. 3: The Issue Sought To Be Precluded Was Actually Decided

The Industrial Commission erroneously found in its 12.10.12 Order On Reconsideration that it actually decided the full extent of Employer's liability for all of the Claimant's accident-related medical expenses at the 9.28.10 Hearing:

> Likewise, it is clear that the issue sought to be precluded was actually decided in the prior litigation. In the prior hearing, the Industrial Commission actually did decide the issue of the extent of Claimant's entitlement to benefits. It is true that Claimant has since discovered additional medial bills, but is equally clear that the issue which the Commission decided was not limited only to those medical bills of which Claimant was aware as of the date of hearing; the issue was the extent of Claimant's entitlement to medical benefits. (R. Vol. III, p. 456, Ll. 18-23).

When the Claimant requested a sum certain of past medical benefits in his 11.19.10 post-hearing Brief, the Claimant made it very clear to the Industrial Commission he was only requesting a sum certain of the specific past medical benefit claims that had been adjudicated at

the 9.28.10 Hearing as Exhibit No. 7 so that he could obtain an enforceable judgment pursuant to Idaho Code §72-735 upon which interest could accrue pursuant to Idaho Code §72-734.

> A determination of liability without the determination of the amount of compensation is not a final order. Lines v. Idaho Forest Industries, 125 Idaho 462, 464, 872 P.2d 725, 727 (1994). *Hartman v. Double L Mfg.,* 141 Idaho 456, 458, 111 P.3d 141, 143 (2005).

The language of the Commission's 5.17.11 Order proves that the Industrial Commission understood that it did not adjudicate the full extent of all of the Claimant's past medical benefit claims at the 9.28.10 Hearing but, rather only adjudicated Employer's liability under *Neel* for the payment of 100% of the invoiced amount of the denied medical benefit claims that had been adjudicated at the 9.28.10 Hearing as Exhibit No. 7:

> Claimant has incurred medical expenses totaling $149,033.68. *See* Claimant's Exhibit 7 (R., Vol. I, p. 50, Ll. 20-21).
>
> Therefore, as in *Neel*, we find Claimant is entitled to payment of the full invoiced amount of $149,033.68 (R., Vol. I, p. 51, Ll. 2-3).

The Commission did not state in its 5.17.11 Order that by paying 100% of the invoiced amount of the medical benefits adjudicated at the 9.28.10 Hearing as Exhibit No. 7, Employer would receive an unearned credit for paying 100% of the invoiced amount of all past medical benefits – even those benefits that had never been adjudicated.

If the Commission had expressed this new intent in its original 5.17.11 Order, the Claimant would have promptly filed a Motion For Reconsideration, but there was no reason to at the time since the Commission had merely ordered Employer to pay 100% of the invoiced amount of all medical benefit claims that had been adjudicated as Exhibit No. 7 in accordance with this Court's holding in *Neel*.

> "Since the inception of Idaho's Workers' Compensation Act, Industrial Commission proceedings have been informal and designed for simplicity; the primary purpose of these proceedings being the attainment of justice in each individual case." Hagler v. Micron Technology, Inc., 118 Idaho 596, 599, 798 P.2d 55, 58 (1990). Industrial Commission proceedings should be simple, accommodating to claimants, and above all seek justice. Id. "[T]he Commission has historically been imbued with certain powers that specifically enable it to simplify proceedings and enhance the likelihood of equitable and just results." Id.
>
> When a claimant has failed or overlooked submitting evidence to establish the amount of compensation to which he is entitled, and there is no question but that he is entitled to compensation, then it is the duty of the Board to call attention to such failure and see to it that whatever evidence is available to establish such fact is presented, and then make the necessary findings of fact. Watkins v. Cavanagh, 61 Idaho 720, 722, 107 P.2d 155, 157 (1940) (quoting Feuling v. Farmers' Co-operative Ditch Co., 54 Idaho 326, 334, 31 P.2d 683, 686 (1934). *Hartman, supra,* 141 Idaho 456, 458, 111 P.3d 141, 143 (2005).

When the Commission surprised the Claimant with this new interpretation of its 5.7.11 Order in its 12.10.12 Order On Reconsideration so that it could apply the doctrine of collateral estoppel to deprive the Claimant of the medical benefits that he was entitled to pursuant to Idaho Code §72-432 and this Court's holding in *Neel*, the Claimant promptly filed a Motion For Reconsideration on 12.19.12 (R., Vol. III, pp. 465-494), but the Commission deprived him of the opportunity to be heard on the subject by denying his 12.19.12 Motion For Reconsideration without analysis or discussion (R., Vol. III, pp. 504-506).

When the Employer finally paid Claimant 100% of the invoiced amount of the Exhibit 7 bills in February of 2012 (after several months of litigation and 2 failed interlocutory appeals to the Idaho Supreme Court), **Employer did not expressly state** that its payment was conditioned on the Claimant agreeing to accept Employer's payment of the Exhibit No. 7 bills in full satisfaction of Employer's liability for the payment of ALL past denied medical benefits:

> Upon learning that the Court dismissed my interlocutory appeal by order of January 30, 2012, my client issued prompt payment to you on February 2, 2012, for the sum of $184,172.38. **This amount includes all benefits ordered by the Industrial Commission in its May 17, 2011 order** ($149,033.68 in medical benefits and $28,352.70 in temporary disability benefits), as well as interest from the date of the decision through the date o f payment ($6,786.00). **Thus, all benefits ordered have been paid.** (*See* Claimant's 5.17.12 H.E. 017022) (emphasis supplied).

Employer did not state in its 2.14.12 letter that its 2.2.12 payment of the Exhibit No. 7 medical benefit claims would constitute full payment of 100% of ALL past medical benefits that the Claimant incurred from the date of his 12.18.09 injury to the date when the Commission deemed this claim compensable on 5.17.11.

Employer did not state that by making this partial payment it expected to receive full credit for paying 100% of all of the Claimant's past medical benefits. By the express language in its letter, Employer clearly understood that its 2.2.12 payment only covered "all benefits ordered by the Industrial Commission in its May 17, 2011 order"; i.e., the medical benefit claims that were adjudicated at the 9.28.10 Hearing as Exhibit No. 7.

Since the plain language of the Commission's 5.17.11 order made it very clear that it only addressed the Employer's *Neel* liability for the payment of 100% of the past medical benefit claims that had been adjudicated as Exhibit 7, Employer either knew or should have known that it would only receive credit for paying those specific past medical benefit claims when it made its unconditional payment on 2.2.12.

The Commission's finding that it decided the full extent of Employer's liability for the payment of all of the Claimant's past medical bills in its 5.7.11 decision is not supported by substantial and competent evidence in the record. This Court should reverse this finding and the

Commission's application of collateral estoppel to deprive the Claimant of the medical benefits that he was entitled to pursuant to Idaho Code §72-432 and this Court's holding in *Neel*.

Element No. 4: A Final Judgment on the Merits

The doctrine of collateral estoppel can only be used in those cases where the prior order sought to be given preclusive effect is a final and appealable order. *Stoddard v. Hagadone Corp.*, 147 Idaho 186, 191, 207 P.3d 162, 167 (2009). This is not one of those cases. When Employer filed its 1st interlocutory appeal in this case on 6.20.11, the Claimant filed a Motion For Involuntary Dismissal with the Supreme Court based on the grounds that the Commission's 5.17.11 Order was not a final and appealable order. The Supreme Court granted Claimant's Motion For Involuntary Dismissal on 7.27.11 (R., Vol. I, pp. 74-75).

Employer then filed a Motion For Clarification which the Supreme Court denied on 8.15.11 (R., Vol. I, p. 76). In its 8.15.11 Order dismissing Employer's appeal, the Supreme Court specifically referred Employer to its holding in *Jensen v. Pillsbury Co.*, 121 Idaho 127, 823 P.2d 161 (1992) and the Industrial Commission's retention of jurisdiction as evidenced by its 7.7.11 Amended Notice of Telephone Conference and Notice of Hearing.

> This Court held recently that, "a decision of the Commission which does not finally dispose of all of the claimant's claims would not be a final decision subject to appeal pursuant to I.A.R. 11(d)...." Kindred v. Amalgamated Sugar Co, 118 Idaho 147, 149, 795 P.2d 309, 311 (1990). Additionally, in Reynolds v. Browning Ferris Indus., 113 Idaho 965, 969, 751 P.2d 113, 117 (1988), we held that "whenever the Commission explicitly retains jurisdiction over a matter, that act by its very nature infers that there is neither a final determination of the case nor a final permanent award to claimant." *Jensen, supra*, 121 Idaho 127, 127-128, 823 P.2d 161, 161-162 (1992).

By granting the Claimant's Motion For Involuntary Dismissal and denying Employer's Motion For Clarification with specific reference to its holding in *Jensen* and the Commission's

retention of jurisdiction, the Idaho Supreme Court has established the **law of this case** to be that the Commission's 5.17.11 decision was not a final and appealable order that collateral estoppel could be applied to:

> The "law of the case" doctrine provides that when "the Supreme Court, in deciding a case presented states in its opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal." *Swanson v. Swanson,* 134 Idaho 512, 515, 5 P.3d 973, 976 (2000) *Spur Products Corp. v. Stoel Rives LLP*, 143 Idaho 812, 816, 153 P.3d 1158, 1162 (2007).

Employer has even admitted that it knew the law of this case to be that the Commission's 5.17.11 order was not a final order that would support application of collateral estoppel:

> Ironically, Defendants sought to have the Commission's May 17, 2011, award modified to reflect the lack of finality of the award, consistent with the Supreme Court's determination that the award was not final for purposes of an appeal. Defendants specifically pointed out that such modification, based on the theory of manifest injustice, would allow Claimant to present additional evidence regarding medical benefits not awarded by the initial decision (*See* p. 25 of Employer's 8.15.12 Reply Brief).

Since the doctrine of collateral estoppel can only be applied against a final order which disposes of all of the disputed issues on the merits, the Commission committed plain legal error when it used collateral estoppel to give preclusive effect to the Commission's non-final 5.17.11 Order.

Finally, the Industrial Commission has previously held that the doctrine of collateral estoppel should not be used in cases like this where there are multiple hearings between the same parties:

> Collateral estoppel is inapplicable in cases like this one where the litigation, albeit including several different hearings, is nevertheless all part of the same case. *Berisha*

v. The Grove Hotel and Insurance Company of the West, 2012 WL, 2118142, I.C. 2002-003038 (Filed: 5.30.12)(*See* ¶13 on p. 13).

Based on the grounds set forth above, the Claimant respectfully requests that the Court reverse the Industrial Commission's use of collateral estoppel in its 12.10.12 Order and Order Employer to pay Claimant 100% of the invoiced amount of all past denied medical benefits incurred by Claimant from date of injury on 12.18.09 to the date when the Commission found this claim compensable on 5.17.11 based on this Court's holding in *Neel*, with proper credit for the benefits Employer previously paid to satisfy the past medical benefit claims adjudicated at the 9.28.10 Hearing as Claimant's Exhibit No. 7.

4. THE COURT SHOULD REVERSE THE INDUSTRIAL COMMISSION'S DECISION IN THIS "CLOSE CASE" TO ONLY AWARD ATTORNEY'S FEES BASED ON EMPLOYER'S UNREASONABLE REFUSAL TO PAY CLAIMANT HIS UNDISPUTED PPI BENEFITS AND AWARD ATTORNEY'S FEES AT EVERY STAGE OF THIS CLAIM

Employer denied this claim on the exclusive legal ground that the Claimant's low back injury did not arise out of his employment. The Claimant asked Employer to reverse its unreasonable denial because the Claimant was injured on his Employer's premises which gave rise to a presumption that his injury arose out of employment. The Claimant asked Employer to share any facts that would overcome this presumption, but Employer failed to present any evidence to rebut the presumption. The Claimant reminded Employer that all doubts over whether in injury arises out of employment, must be resolved in the Claimant's favor. Employer ignored the Claimant's arguments and persisted in its unreasonable denial.

The Claimant was forced to file a Complaint with the Industrial Commission and litigate all disputed issues to 2 Hearings before the Industrial Commission and 3 appeals to this Court.

Although the Commission characterized the attorney's fee issue as a **"close call",** the Commission did not award attorney's fees to Claimant in its 5.17.11 Order or its 12.8.11 Order. The Claimant explained in his 5.22.13 Respondent's Brief why this Court should reverse the Commission's denial of Claimant's request for attorney's fees and identified the specific assignments of error made by the Commission when it ruled against the Claimant on the attorney's fee issue (*See* pp. 51-58 of Claimant's 5.22.13 Respondent's Brief).

Employer did not address the Claimant's assignments of error on the attorney fee issue in its 6.19.13 Reply Brief but focused both of its arguments on the Commission's decision to award Claimant attorney's fees in its 12.5.12 Order and its 12.10.12 Order On Reconsideration. The first argument made by Employer is that the Industrial Commission erred by awarding attorney's fees because it had previously stated in its 12.8.11 Order Denying Stay that it would not revisit any of the issues decided in the 5.17.11 decision (*See* p. 38, Ll. 3-5 of Employer's 6.19.13 Reply Brief). Employer has taken the Industrial Commission's statement out of context.

> Therefore, under the plain language of the statute, the May 17, 2011 decision is final as to the matters of whether Claimant suffered an injury arising out of employment, whether Claimant is entitled to TTD benefits, whether Claimant is entitled to medical benefits, and whether Claimant is entitled to attorney's fees. These issues will not be revisited by the Commission in future decisions, absent instruction by the Court following appeal (R., Vol. II, p. 208, Ll. 12-17).

The Commission simply meant that it would not consider another request for attorney's fees for any of Employer's unreasonable conduct that occurred prior to the date of the Commission's 5.17.11 compensability decision because the Commission had already adjudicated the Claimant's right to attorney's fees during that stage of the case in its 5.17.11 decision. Employer's argument that the Commission's 12.8.11 Order Denying Stay gives the Employer

prophylactic protection from all future awards of attorney's fees is clearly erroneous since the Commission does not have authority to issue prophylactic orders that bar an award of attorney's fees based on future unreasonable conduct that has not even happened.

Employer next argues that it had no obligation to pay the Claimant his undisputed 12% whole person PPI rating because it has always disputed the issue of causation. This argument is directly contradicted by the evidence in the record which conclusively proves that **Employer has never challenged causation in this case:**

> The Industrial Commission asserted that following the Supreme Court's Order Denying Permissive Appeal, UPS should have paid Respondent the portion of impairment (12%) that Dr. Frizzell opined was related to his 2009 injury. This, despite the fact that UPS continued to dispute the issue of causation and Respondent had not proven his entitlement to such benefits. Dr. Frizzells' rating was disputed by virtue of the fact that causation was disputed... (*See* p. 39, Ll. 4-9 of Employer's 6.19.13 Reply Brief).

Employer misstates the evidence in the record. Employer has never disputed the issue of causation. Employer only has only disputed the issue of apportionment of permanent physical impairment (PPI) benefits; i.e., what percentage of Claimant's 3.10.11 19% whole person PPI rating should be "apportioned" to Claimant's 10.22.90 low back injury so that Employer could attempt to shift liability to the ISIF.

The Claimant's attending physicians are the only medical experts in this case who have issued medical causation opinions. Employer did not hire any Independent Medical Experts (IME) to address the causation issue. On 1.14.10, the Claimant's attending physician, Scott S. Harris, M.D., of Payette Lakes Medical Center, opined that the Claimant's 12.18.09 bending over to tie the laces on his work boots accident *caused* his low back injury (CL. 9.28.10 EX. 2,

002003). On 2.6.10, the Claimant's attending neurological surgeon, R. Tyler Frizzell, M.D., opined that the Claimant's 12.18.09 bending over to tie his work boots accident *caused* his L4-5 disc herniations and bulges. Dr. Frizzelll also opined that Claimant required urgent back surgery on 1.20.10 due to his early cauda equina syndrome (CL. 9.28.10. EX. 3, 003040).

On 2.23.10, Dr. Frizzell reiterated his opinion that the Claimant's 12.18.09 back injury at UPS *caused* his L4-5 disc herniation and resulted in the need for his 1.20.10 L4-5 discectomy and laminectomy (CL. 9.28.10 EX. 3, 003042). On 7.21.10, Dr. Frizzell reiterated his opinion that that the Claimant's 12.18.09 accident had *caused* the Claimant's L4-5 disc herniation and cauda equina symptoms and resulted in the need for his 1.20.10 L4-5 discectomy and laminectomy (CL. 9.28.10 EX. 3, 003054).

On 8.19.10, Dr. Frizzell opined that the Claimant's 12.18.09 industrial accident *caused* the need for the Claimant's 7.21.10 second back surgery; i.e., decompression for recurrent disc herniation and L4-5 lumbar fusion (CL. 9.28.10 EX. 3, 003059). On 9.16.10, Dr. Frizzell reiterated that the need for the Claimant's second back surgery on 7.21.10 was *caused* by his 12.18.09 industrial accident (CL. 9.28.10 EX. 3, 003062).

Employer did <u>not</u> dispute the causal relationship between the Claimant's 12.18.09 industrial accident and his need for 2 back surgeries when it denied this claim on 1.8.10 and 2.26.10 (CL. 9.28.10 EX. 8 and EX. 9, 009006). The Industrial Commission held that "there is no dispute that Claimant's injuries are causally related to the accident" (R., Vol. I, p. 39, Ll. 17-18).

Although Employer argues in its 6.19.13 brief that it has always challenged causation, that is simply not true. Likewise, Employer never challenged Dr. Frizzell's decision to apportion 7%

of the Claimant's 3.10.11 19% whole person PPI rating to the Claimant's 10.22.90 low back injury which left an undisputed 12% whole person PPI rating due specifically to the Claimant's 12.18.09 industrial accident (Cl. 5.17.12 EX. 1, 001101). In fact it would have been strange if Employer had challenged that apportionment opinion since it was Employer who asked Dr. Frizzell to apportion some percentage of Claimant's 19% whole person PPI rating to his 10.22.90 low back injury so that it could transfer liability to the ISIF (CL. 5.17.12 EX 1, 001099-001100).

The Industrial Commission awarded the Claimant attorney's fees in its 12.5.10 Order and 12.10.12 Order On Reconsideration because the Employer asked Dr. Frizzell for an apportionment opinion on 3.7.11, received Dr. Frizzell's undisputed 12% / 7% apportionment opinion on 3.10.11, **did not hire any IME medical expert to challenge or dispute that apportionment opinion**, but still refused to pay Claimant the undisputed 12% PPI rating that Dr. Frizzell assigned to the 12.18.09 injury in spite of receiving multiple demands for payment from Claimant (CL. 5.17.12 EX. 17). The Court should affirm the Commission's 12.5.12 and 12.10.12 Orders awarding fees.

The Employer has always argued throughout these proceedings that it does not have any obligation to pay the Claimant any of the worker's compensation benefits that he is entitled to receive under the Idaho Worker's Compensation Act (in spite of the Commission's 5.17.11 compensability decision) until after this Court enters a final decision on appeal. The Industrial Commission explained why that defense to the non-payment of benefits was unreasonable in its 12.8.11 decision and its 12.5.12 decision:

> As noted above, the Commission's final order on the issue of compensability brings with it an obligation to pay to Claimant those workers' compensation benefits to

which he would normally be entitled as a result of having suffered a compensable accident/injury" (R., Vol. III, p. 435, Ll. 7-10).

What Employer/Surety has failed to understand, however, is that the Commission's finding that the subject accident is compensable carries with it an obligation on the part of Employer/Surety to pay to Claimant those workers' [sic][worker's] compensation benefits to which he is entitled as a result of the accident. We find nothing in the correspondence going back and forth between Claimant's counsel and Defense Counsel which suggests that Employer/Surety at any time disputed the claims for additional benefits to which Claimant believed he was entitled. The only basis for denial was the aforementioned belief that Employer/Surety had no obligation under the May 17, 2011 order to pay anything except those benefits which were specifically addressed in that order.

As explained in more detail in our December 8, 2011 order denying Employer's motion for stay, it is the expectation of the Industrial Commission that its final order on compensability binds the parties to act accordingly during the pendency of this bifurcated matter. It is no defense to Claimant's manifold requests to simply say that Claimant's entitlement to the benefits at issue will be decided in connection with the May 17, 2012 hearing. Absent a good faith dispute over Claimant's entitlement to a particular benefit, Employer/Surety had an obligation to timely pay the same once this claim had been found to be compensable under the workers' compensation laws of this state. (*See* Idaho Code § 72-304) (R., Vol. III, p. 438, Ll. 2-18).

Based on all of the evidence in the record and all of the attorney's fees arguments that Claimant has made in all briefs filed with the Industrial Commission and this Court, the Claimant respectfully requests an Order from this Court which awards the Claimant attorney's fees at every stage of the litigation from date of injury on 12.18.09 to the date of final decision on appeal and on remand to the Commission if a remand becomes necessary pursuant to Idaho Code §72-804 and this Court's holding in *Stevens-McAtee v. Potlatch Corp.,* 145 Idaho 325, 179 P.3d 288 (2008).

CONCLUSION

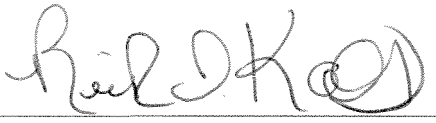
Based on record and briefs before the Industrial Commission and the briefs filed with the Supreme Court, The Claimant respectfully requests that this Court enter the following Orders on

appeal:

1. An Order **affirming** the Commission's 5.17.11 "arose out of" employment ruling and award of past denied medical benefits and retroactive total temporary disability benefits;
2. An Order **reversing** the Commission's 5.17.11 decision that Employer came forward with sufficient evidence to rebut the premises presumption;
3. An Order ruling that Claimant was entitled to a favorable ruling on the arose out employment issue **as a matter of law** based on the proper application of the premises presumption to the unique facts of this case because Employer only denied this claim on the exclusive legal grounds that Claimant's accident and injury did not arise out of employment;
4. An Order **reversing** the Commission's 5.17.11 decision to not award the Claimant attorney's fees;
5. An Order instructing Employer that it had a duty to comply with the Industrial Commission's Orders even if they were not final and appealable Orders and explaining the consequences of its failure to do so;
6. An Order **reversing** the Commission's 12.8.11 decision to not award the Claimant attorney's fees;
7. An Order **affirming** the Claimant's 19% whole person PPI rating and assigning 100% of that rating to the Claimant's 12.18.09 injury;
8. An Order **reversing** the Commission's 12.5.12 decision to apportion 7% of the Claimant's 19% PPI rating to the Claimant's 10.22.90 injury;
9. An Order **reversing** the Commission's 12.5.12 decision that Claimant's 10.22.90 7% impairment was a subjective hindrance to employment prior to his 12.18.09 injury;
10. An Order **reversing** the Commission's 12.5.12 decision that Claimant's 10.22.90 7% impairment combined with Claimant's 12.18.09 injury to cause total and permanent disability;
11. An Order **affirming** the Industrial Commission's 12.5.12 decision that quasi-estoppel prevents Employer from shifting any liability for Claimant's total and permanent disability to the ISIF;
12. An Order **affirming** the Industrial Commission's 12.5.12 decision to award the Claimant attorney's fees;
13. An Order **reversing** the Industrial Commission's 12.10.12 decision to use *collateral estoppel* to give Employer an unearned credit for the payment of past denied benefits that Employer never actually paid;
14. An Order **reversing** the Commission's 12.10.12 decision to use *collateral estoppel* to limit its award of attorney's fees to Employer's unreasonable refusal to pay Claimant his undisputed 12% PPI award; and
15. An Order **awarding** Claimant attorney's fees based on the percentages set forth in his Legal Services Contingency Fee Employment Agreement at every stage of this litigation from date of injury to date of final decision on appeal and on remand.

Respectfully submitted this 10th day of July, 2013.

Ellsworth, Kallas, & DeFranco, PLLC



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of July, 2013, I hand-delivered 2 copies of the foregoing Respondent's Reply Brief to the following:

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